FOR ARGUMENT

No. 03-8661

Supreme Court, U.S.
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In The Supreme Court of the United States

MELVIN T. SMITH,

Petitioner,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Appeals Court Of The Commonwealth Of Massachusetts

BRIEF OF *AMICI CURIAE* STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, DELAWARE, HAWAII, ILLINOIS, IOWA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, UTAH, VERMONT, VIRGINIA, AND WEST VIRGINIA IN SUPPORT OF RESPONDENT

LAWRENCE G. WASDEN
Idaho Attorney General

KENNETH K. JORGENSEN*
LORI A. FLEMING
JESSICA M. BORUP
Deputy Idaho Attorneys General

P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

**Counsel of Record*

[Additional *Amici* Listed Inside]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Alabama Attorney General
Alabama Statehouse
11 South Union St., Third Floor
Montgomery, AL 36130
(334) 242-7300

GREGG D. RENKES
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-2133
(907) 465-2075 (fax)

TERRY GODDARD
Arizona Attorney General
Department of Law
1275 West Washington St.
Phoenix, AZ 85007
(602) 542-5025
(602) 542-4085 (fax)

M. JANE BRADY
Attorney General of Delaware
Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8400

MARK J. BENNETT
Attorney General of Hawaii
425 Queen St.
Honolulu, HI 96813
(808) 586-1500

LISA MADIGAN
Attorney General of Illinois
Office of the Illinois
Attorney General
100 West Randolph Street,
12th Floor
Chicago, IL 60601
(312) 814-3698
(312) 814-5024 (fax)

TOM MILLER
Iowa Attorney General
1305 E. Walnut St.
Des Moines, IA 50319
(515) 281-5164
(515) 281-4209 (fax)

MIKE MCGRATH
Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

JON BRUNING
Attorney General
of Nebraska
Office of the Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
(402) 471-3297 (fax)

BRIAN SANDOVAL
Attorney General
Nevada Department
of Justice
100 North Carson Street
Carson City, NV 89701-4717
(775) 684-1100

KELLY A. AYOTTE
Attorney General
New Hampshire
Department of Justice
33 Capitol Street
Concord, NH 03301
(603) 271-3658

WAYNE STENEHJEM
Attorney General
of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210
(701 328-2226 (fax)

JIM PETRO
Ohio Attorney General
State Office Tower
30 E. Broad Street 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, OK
73105-4894
(405) 521-3921

HARDY MYERS
State of Oregon
Attorney General
1162 Court St. N.E.
Salem, OR 97301
(503) 378-4400

GERALD J. PAPPERT
Attorney General
Commonwealth of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

PATRICK C. LYNCH
Rhode Island Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, UT
84114-2320
(801) 538-9600

WILLIAM H. SORRELL
Attorney General,
State of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

JERRY W. KILGORE
Attorney General of Virginia
William E. Thro
State Solicitor General
Office of the
Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-2436
(804) 786-1991 (fax)

DARRELL V. MCGRAW, JR.
Attorney General
of West Virginia
Office of the
Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

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STATEMENT OF *AMICI CURIAE* INTEREST

Idaho, and the 21 other states that join in this brief, urge the Court to affirm the holding of the Massachusetts Appeals Court in *Commonwealth v. Smith*, 788 N.E.2d 977 (Mass. App. 2003). The states have an interest in a full and fair opportunity to have their charges against criminal defendants fully litigated and decided by a jury or a trier of fact. Idaho and the states joining this brief believe that interest is best served by a double jeopardy legal standard that allows a trial judge to reconsider a mid-trial ruling that the evidence presented is insufficient prior to the termination of the trial proceedings.

SUMMARY OF THE ARGUMENT

The Petitioner, Melvin T. Smith, requests this Court to hold that the trial court's ruling on his mid-trial motion was an acquittal for purposes of the Double Jeopardy Clause, which, he argues, precludes any sort of review or reconsideration, even by the trial judge prior to discharge of the jury. The Respondent, the Commonwealth of Massachusetts, requests this Court to hold that the trial court's mid-trial ruling on the sufficiency of the evidence was not an acquittal for purposes of application of the Double Jeopardy Clause. The *amici* states concur in the argument of the Respondent. The *amici* states, however, further respectfully submit that, even if a mid-trial ruling that the evidence is insufficient is considered an acquittal, such acquittal alone does not terminate jeopardy. Rather, the ruling on the sufficiency of the evidence coupled with the release of the jury from its oath to determine the charge (or termination of the bench trial) is what ends jeopardy, and thus a trial court does not offend the Double Jeopardy Clause by

reconsidering, prior to ending the trial itself, its legal ruling that the evidence is insufficient.

The primary evil the Double Jeopardy Clause guards against by not allowing a challenge to an acquittal is repeated attempts by the government to convict. The State has a legitimate interest in having a full and fair opportunity to prove its case to the jury. Allowing a judge to reconsider, prior to dismissal of the jury empanelled to hear the charge, an erroneous ruling that the prosecution has not presented sufficient evidence to prove the merits of the charge protects all of the rights of the defendant, avoids the primary evil of creating the need for a second trial, and protects the governmental interest in having a full and fair opportunity to present its case.

ARGUMENT

I.

The Double Jeopardy Clause is not Offended where a Trial Court Reconsiders an Erroneous Ruling that the Evidence is Insufficient Prior to Terminating the Trial Itself

This Court's opinions interpreting the protection of the Double Jeopardy Clause "establish that the primary evil to be guarded against is successive prosecutions: '[t]he prohibition against multiple trials is the controlling constitutional principle.'" *Schiro v. Farley*, 510 U.S. 222, 230 (1994) (brackets original) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980)). The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). An acquittal is generally deemed

to "terminate the initial jeopardy," so that "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). That Clause, however, is "not offended" if there is no threat of "successive prosecutions." *United States v. Wilson*, 420 U.S. 332, 344 (1975).

Given this state of the law, it is hardly surprising that the parties to this appeal have focused their arguments upon whether the actions of the trial court constitute an "acquittal" for purposes of the Double Jeopardy Clause. The *amici* states in this brief, however, respectfully suggest that, even if the initial ruling of the trial court is deemed an acquittal, reconsidering and ultimately allowing the disputed charge to go to the jury did not violate the Double Jeopardy Clause because such was entirely consistent with the history and policy behind the Clause.

This Court addressed the policy and history of the Double Jeopardy Clause in *United States v. Wilson*, 420 U.S. 332 (1975), where the question was whether a governmental appeal of a judgment of acquittal following a jury verdict of conviction was permitted by the Double Jeopardy Clause. In that case this Court noted that the genesis of the right against double jeopardy arose out of the three common-law pleas of *autrefois acquit*, *autrefois convict* and pardon, which could be raised "to bar the second trial of a defendant. . . ." *Id.* at 339-42. "It was only when the defendant was indicted for a second time after either conviction or an acquittal that he could seek the protection of the common-law pleas." *Id.* at 342. This historical background, concluded the Court, "suggests" that the Double Jeopardy Clause "was directed at the threat of multiple prosecutions, not at Government

appeals, at least where those appeals would not require a new trial." *Id.*

The Court also found this history reflected in cases interpreting the double jeopardy protections against "second prosecution" or "multiple trials." *Id.* at 342-43. "By contrast, where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *Id.* at 344. Thus, "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 345.

Finally, the Court determined that allowing government appeals of acquittals would infringe upon the rights protected by the Double Jeopardy Clause because it "would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *Id.* at 352. Allowing appeals of post-verdict legal rulings, however, "would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions." *Id.*

Although the Court in *Wilson* was talking about the government appealing an order of acquittal entered after a guilty verdict, its analysis applies equally well to whether the government can request a trial judge to reconsider a ruling that the evidence was insufficient prior to any actual or constructive termination of the trial itself. Just like with governmental appeals, a trial judge reconsidering an

erroneous ruling on the adequacy of evidence prior to the termination of the trial will not result in a second prosecution or multiple trials; the prosecution being able to seek to persuade a second trier of fact of guilt after failing with the first; or the prosecution re-examining weaknesses in the first presentation of evidence to strengthen a second presentation.

Because the history of and the policy behind the Double Jeopardy Clause show its purpose is to prevent second prosecutions and multiple trials, the Clause is not offended by the prosecution asking for, or the judge undertaking, reconsideration of an erroneous legal conclusion that the evidence is insufficient to support the charge where granting that request will merely mean continuation of a trial already in progress. Where the trier of fact is available to determine guilt or its absence in the course of a single proceeding, reconsideration of a determination on the sufficiency of the evidence does not lead to the risk of a second trial. Therefore, holding that initial jeopardy does not terminate until there has been both an acquittal and an end to the trial best promotes the historical and policy underpinnings of the Double Jeopardy Clause.

That jeopardy does not terminate until there has been both an acquittal and an end of trial proceedings is also consistent with the double jeopardy precedent of this Court. For example, in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the jury was discharged after being deadlocked and thereafter the trial judge entered an order of acquittal. Thus, in *Martin Linen* there had been both an acquittal and a termination of the trial in the discharge of the jury following a mistrial. In finding that a governmental appeal of the acquittal violated the Double Jeopardy Clause the Court reiterated that the

"'controlling constitutional principle' focuses on prohibitions against multiple trials." *Id.* at 569 (quoting *United States v. Wilson*, 420 U.S. 332, 346 (1975)). This prohibition "rests upon two threshold conditions": that the Clause only applies where the defendant has been placed in jeopardy, and jeopardy attaches when a jury is empanelled and sworn or evidence is presented in a bench trial. *Martin Linen*, at 569. Furthermore, this Court concluded that the timing of the acquittal in relation to the discharge of the jury was not constitutionally significant, *id.* at 573-74, suggesting that the discharge of the jury itself was significant to the conclusion that allowing a state appeal of the acquittal violated double jeopardy protections.

Because this Court's cases have dealt primarily with whether a government appeal and remand thereafter would constitute a second jeopardy, this Court has never squarely addressed whether an end to the trial is a necessary predicate to the termination of the initial jeopardy. Perhaps the closest this Court has come to this question was in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), relied upon heavily by Petitioner in this case. The Smalises underwent a bench trial on a variety of charges related to a suspected arson. The trial court ruled at the close of the state's case, as "the trier of fact and law," that the evidence was not sufficient to sustain convictions in relation to some of the charges. *Id.* at 141-42. This Court held that this ruling constituted an acquittal barring further proceedings. *Id.* at 144.

In addressing Pennsylvania's argument that resumption of the bench trial would "simply constitute 'continuing jeopardy,'" the Court stated that "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy

Clause." *Id.* at 145 (citing *Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984)). Allowing an appeal that would lead to such disallowed proceedings therefore "would frustrate the interest of the accused in having an end to the proceedings against him." *Id.* Thus, "the Double Jeopardy Clause bars a post acquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into 'further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged.'" *Id.* at 145-46 (quoting *Martin Linen*, 430 U.S. at 570).

This Court's stated prohibition against "further proceedings" after a successful appeal of an acquittal is not a bar to continuing the same proceeding after reconsideration by the trial judge of her ruling that the evidence was insufficient. Unlike the situations in *Martin Linen*, 430 U.S. at 570 (where the "further proceedings" would have been a new trial after appeal and remand), *Rumsey*, 467 U.S. at 211-12 (where the "further proceedings" would have been a new sentencing hearing regarding application of the death penalty after appeal and remand), and *Smalis*, 476 U.S. at 145-46 (where the "further proceedings" would have been at least a resumption of trial after appeal and remand, years after the trial court's grant of demurrer), there is only one "proceeding" – beginning at the empanelling and swearing of the jury or the presentation of evidence in a bench trial and ending with a verdict of guilty or not guilty – where a judge rules the evidence insufficient at mid-trial but reconsiders and either submits the charge to a jury never released from its charge, or renders a verdict on the merits having never terminated the trial.

Allowing the trial court to reconsider an erroneous ruling on the sufficiency of the evidence is also justified by public interest. In contrast with the primary evil guarded against by the Double Jeopardy Clause, "the public" has a "valued right to 'one complete opportunity to convict those who have violated its laws.'" *United States v. Scott*, 437 U.S. 82, 100 (1978) (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)); *see also Richardson v. United States*, 468 U.S. 317, 325 (1984) ("The Government, like the defendant, is entitled to resolution of the case by verdict from the jury. . . ."). Where there has "been none of the governmental overreaching that double jeopardy is supposed to prevent" prematurely ending the prosecution "would deny the State its right to one full and fair opportunity to convict those that have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 502 (1984). Allowing one complete proceeding – a trial – promotes this "valued right." Reconsideration, before the trial has ended, of an erroneous ruling that the evidence is insufficient for conviction is not governmental overreaching prevented by the Double Jeopardy Clause. Unlike situations where the trial has ended and appeals have been pursued for years, allowing the trial court to reconsider its ruling prior to the formal or informal termination of the trial allows the public a complete opportunity to prove its charge without requiring the defendant to defend against the charge more than once.

Even if an erroneous conclusion that the evidence is insufficient is deemed an acquittal, allowing the judge to reconsider that ruling *in the course of the same trial* is consistent with sparing a defendant from the primary evil of successive prosecutions and with the history of the Double Jeopardy Clause. Such does not lead to "further

proceedings" to determine guilt, as would allowing an appeal or a new trial. Allowing such reconsideration also balances the public interest in having a criminal charge determined in a single proceeding. The undersigned *amici* states therefore respectfully request this Court to hold that, even if a trial court's ruling on the sufficiency of evidence be deemed an acquittal, reconsideration of that ruling prior to the termination of the trial does not offend the Double Jeopardy Clause.

II.

Allowing Reconsideration of Erroneous Rulings on the Sufficiency of the Evidence Before the Termination of Trial Will Promote Uniformity of Application of Double Jeopardy Principles Among States with Different Procedural Rules

State procedures on defense challenges to the sufficiency of the state's evidence vary widely. *Compare* N.M. R.Crim.P. 5-607(E) (requiring judicial determination of sufficiency of evidence at close of presentation of evidence by prosecution in every case) *with* La. C.Cr.P., art. 778 (not allowing any pre-verdict judicial review of sufficiency of evidence) *and* Okla. St. § 850 (trial judge may recommend verdict of acquittal but may not prevent jury from reaching a verdict). The vast majority of states specifically allow a defendant to challenge the sufficiency of the state's evidence at the close of the prosecution's case. Of these, several specifically provide that the trial court may reserve ruling on the motion until after the jury has returned a verdict. *See, e.g.*, Alaska R.Crim.P. 29; Del. R.Crim.P. 29; Iowa R.Crim.P. 2.19(8); N.Y. Crim. Proc. Laws § 290.10; W.Va. R.Crim.P. 29. Many (including Massachusetts), however, require the court to rule on the

motion before continuing the trial. *See, e.g.,* Alabama R.Crim.P. 20.2; Arizona R.Crim.P. 20; Colorado R.Crim.P. 29; Hawaii R.Penal P. 29; Ill. Ann. Stat. Ch. 725, Act 5, T. VI, Art. 115.4(k); Mass. R.Crim.P. 25; Mich. R.Crim.P. 6.419; Minn. R.Crim.P. 26.03(17); N.J. R.Crim.P. 3:18-1; N.C. St. § 15A-1227; Ohio R.Crim.P. 29; Utah Code Ann. § 77-17-3.

These differing procedures reflect different weighing of competing interests. Some states follow the federal model of Federal Criminal Rule 29 and emphasize the jury's role and allow a judge with doubt as to the propriety of finding the government's evidence insufficient to defer a ruling until after the jury has rendered a verdict. Others, like Massachusetts, favor a policy of granting a criminal defendant an immediate ruling on his motion, possibly sparing him from having to endure the rest of a trial in which the government cannot legally prevail. *See, e.g.,* Comment to Arizona R.Crim.P. 20 (defendant should not be forced to decide to present evidence on his behalf in ignorance of the sufficiency of state's case). One of the drawbacks to the latter procedure, however, is that it increases the likelihood of error. Judges unwilling to delay trials will necessarily make rulings without the benefit of delay that might be necessary or appropriate to reflect on the evidence or do legal research on the standards by which the jury might weigh the evidence. Preventing all reconsideration of erroneous rulings would therefore have the effect of creating a greater burden upon states that have elected to afford their criminal defendants with immediate rulings on mid-trial motions challenging the sufficiency of the evidence against them.

If this court should adopt the Petitioner's view of the Double Jeopardy Clause and hold that no erroneous ruling

on the sufficiency of the evidence may be reconsidered in the course of the trial, the number of criminal defendants erroneously placed beyond the state's ability to try will increase. More error is likely in such states where trial judges do not have the luxury of delaying a ruling in order to do necessary legal research. This will increase the cost to states that have made the policy determination that defendants should be spared the burden of finishing a trial where the trial judge determines the evidence to be insufficient, and will result in a lack of uniformity in application of double jeopardy principles among states.

On the contrary, allowing a trial judge to reconsider an erroneous ruling prior to the termination of the trial itself will result in fewer cases settled on less than the merits of the charges. Such a rule applies easily to the procedures applied by the various states and will not increase the societal cost to those states that do not allow a trial judge to postpone a ruling on the sufficiency of the evidence until after a verdict is rendered. Even in those states that allow reservation of a ruling, courts will feel less compelled to reserve a ruling they know will not be immediately beyond their ability to correct if they are in error.

Because of the policy issues implicated in the issue presented in this case, and the merits as set forth above, the undersigned *amici* states respectfully request this Court to hold that, even if a trial court's ruling on the sufficiency of evidence be deemed an acquittal, reconsideration of that ruling prior to the termination of the trial does not offend the Double Jeopardy Clause.

CONCLUSION

The amici respectfully requests this Court to affirm the judgment of the Appeals Court of Massachusetts.

Respectfully submitted.

LAWRENCE G. WASDEN
Idaho Attorney General

KENNETH K. JORGENSEN*
LORI A. FLEMING
JESSICA M. BORUP
Deputy Idaho Attorneys General

P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

**Counsel of Record*